



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 534

ESTATE OF HENRY W. PUTNAM; GUARANTY
TRUST COMPANY OF NEW YORK, EXECUTOR,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 102689

ESTATE OF HENRY W. PUTNAM, Deceased, GUARANTY TRUST
COMPANY OF NEW YORK, Executor, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Carl A. deGersdorff, Esq., William H.
Gambrell, Esq., James H. Nichols, Esq.

For Comm'r.: L. A. Spaulding, Esq.

DOCKET ENTRIES

1940

- May 16. Petition received and filed. Taxpayer notified.
Fee paid.
- May 16. Request for Circuit hearing in New York City
filed by taxpayer. 5/17/40 copy served.
- May 17. Copy of petition served on General Counsel.
- Jul. 6. Answer filed by General Counsel.
- Jul. 12. Copy of answer served on taxpayer. New York
calendar.

1941

- Feb. 5. Hearing set March 31, 1941 in New York City.
- Mar. 31. Hearing had before Mr. Kern. Submitted. Dock-
ets 102689 & 90 consolidated. Stipulation of
facts filed. Briefs due as per rules.

[fol. 2]

- Apr. 12. Transcript of hearing of March 31, 1941 filed.
- May 15. Brief filed by taxpayer.
- May 15. Motion for extension of 30 days to file brief filed
by General Counsel. 5/16/41 granted.
- Jun. 14. Motion for extension to June 25, 1941 to file brief
filed by General Counsel. 6/16/41 granted.
- Jun. 25. Brief filed by General Counsel.
- Jun. 26. Copy of brief served on General Counsel.
- Jul. 9. Reply brief filed by General Counsel.

1941

- Oct. 28. Findings of fact and opinion rendered, Kern, Div. 16. Decision will be entered under Rule 50. 10/28/41 copy served.
- Nov. 24. Agreed computation of deficiency filed.
- Nov. 25. Decision entered, Kern, Div. 16.

1942

- Feb. 18. Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by General Counsel.
- Feb. 23. Proof of service filed by General Counsel. (2)
- Feb. 25. Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.
- Feb. 25. Proof of service filed by taxpayer.
- Mar. 9. Agreed praecipe for record filed. (Both causes.)
- Mar. 13. Certified copy of order from the 2nd Circuit consolidating causes for briefing, hearing, argument and decision upon a single consolidated transcript of record filed. (Both causes.)

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 102690

[Same title]

Appearances:

For Taxpayer: Carl A. deGersdorff, Esq., William H. Gambrell, Esq., James H. Nichols, Esq.

For Comm'r.: L. A. Spaulding, Esq.

DOCKET ENTRIES

1940

- May 16. Petition received and filed. Taxpayer notified. Fee paid.
- May 16. Request for Circuit hearing in New York City filed by taxpayer. 5/17/40 copy served.
- May 17. Copy of petition served on General Counsel.
- Jul. 6. Answer filed by General Counsel.

1940

- Jul. 12. Copy of answer served on taxpayer. New York calendar.

1941

- Feb. 5. Hearing set March 31, 1941 in New York City.
 Mar. 31. Hearing had before Mr. Kern. Submitted. Dockets 102689 & 90 consolidated. Stipulation of facts filed. Briefs due as per rules.
 Apr. 12. Transcript of hearing of March 31, 1941 filed.
 May 15. Brief filed by taxpayer.
 May 15. Motion for extension of 30 days to file brief filed by General Counsel. 5/16/41 granted.

[fol. 4]

- Jun. 14. Motion for extension to June 25, 1941 to file brief filed by General Counsel. 6/16/41 granted.
 Jun. 25. Brief filed by General Counsel.
 Jun. 26. Copy of brief served on General Counsel.
 Jul. 9. Reply brief filed by General Counsel.
 Oct. 28. Findings of fact and opinion rendered, Kern, Div. 16. Decision will be entered under Rule 50. 10/28/41 copy served.
 Nov. 26. Agreed computation of deficiency filed.
 Nov. 27. Decision entered, Kern, Div. 16.

1942

- Feb. 18. Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by General Counsel.
 Feb. 23. Proof of service filed by General Counsel. (2)
 Feb. 25. Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.
 Feb. 25. Proof of service filed by taxpayer.
 Mar. 9. Agreed praecipe for record filed. (Both causes.)
 Mar. 13. Certified copy of order from the 2nd Circuit consolidating causes for briefing, hearing, argument and decision upon a single consolidated transcript of record filed. (Both causes.)

[fol. 5] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 102689

[Same title]

PETITION—Filed May 16, 1940

The above-named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (SN-IT-1; LAL-90 D) dated March 6, 1940, and as a basis of its proceeding alleges as follows:

1. The petitioner is a fiduciary with its principal office at No. 140 Broadway, in the Borough of Manhattan, City and State of New York. Henry W. Putnam was an individual with his residence at the Savoy-Plaza Hotel, Fifth Avenue and 59th Street, in said Borough of Manhattan. Said Henry W. Putnam died on March 30, 1938. Guaranty Trust Company of New York is a corporation incorporated under the laws of the State of New York, having its principal office and place of business at No. 140 Broadway, in said Borough of Manhattan. Said Guaranty Trust Company of New York qualified as Executor of the Estate of said Henry W. Putnam, deceased, in the Surrogates' Court of the County of New York on June 16, 1938, and is still qualified and acting as such Executor. The return for the period here involved was filed with the Collector of Internal Revenue for the Second District of New York, at the Custom House, New York, New York.

[fol. 6] *2.* The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on March 6, 1940.

3.* The taxes in controversy are the income taxes of the Estate of said decedent for the calendar year 1938. The deficiency asserted is \$2,658.64, the entire amount of which is in controversy. The petitioner asks a refund in the amount of \$41.12. The aggregate amount in controversy is accordingly \$2,699.76.

4.* The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in refusing to exclude from gross income of the Estate of said decedent re-

ported in the income tax return which was filed for the Estate for the calendar year 1938 the amount of \$2,400 which was not the income of the Estate.

(b) The Commissioner erred in adding to the gross income of the Estate of said decedent reported in the income tax return which was filed for the Estate for the calendar year 1938 the amount of \$21,651.75 which was not the income of the Estate.

5.* The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

[fol. 7] (a) Said Henry W. Putnam died on March 30, 1938.

(b) Said decedent at the date of his death owned 4,800 shares of Common Stock of The American Smelting & Refining Company, a New Jersey Corporation. A dividend of \$2,400 (50 cents per share) on said stock was declared on March 1, 1938, payable on May 31, 1938, to stockholders of record on May 6, 1938.

(c) Said dividend was included in the income tax return for 1938 which was filed for the Estate of said decedent.

(d) Said dividend was income of said decedent rather than income of the Estate of said decedent.

(e) In addition to the dividend described in (b) above, the Commissioner has included in the income of the Estate

* The petitioner believes that the notice of deficiency is correct. However, the Commissioner has taken inconsistent positions with respect to the inclusion of dividends declared before the date of death, the record date of which were after the date of death, holding such dividends taxable in *both* the income of the Estate and the income of the decedent in order to protect the interests of the Government. Accordingly the petitioner also has taken inconsistent positions in this petition and in the petition filed concurrently herewith with respect to the 1938 income tax of the decedent in order to protect the interests of the Estate. It is requested that the two cases be considered and decided together.

of said decedent for 1938 the following dividends on stocks owned by said decedent at the date of his death, which dividends were declared before the date of death, but the record dates of which were after the date of death:

Dividend of \$1.25 per share on 1,255 shares General Motors Corporation (a Delaware corporation) \$5 Preferred Stock, declared on February 7, 1938, payable on May 2, 1938, to stockholders of record on April 4, 1938	\$1,568.75
Dividend of 50¢ per share on 50 shares United Profit Sharing Corporation (a Delaware corporation) Preferred Stock, declared on February 24, 1938, payable on April 30, 1938, to stockholders of record on March 31, 1938	25.00
Dividends of 25¢ per share on 1,100 shares Westinghouse Air Brake Manufacturing Company [fol. 8] (a Pennsylvania corporation) Common Stock, declared on November 16, 1937, payable on April 30, 1938, July 30, 1938, and October 31, 1938, to stockholders of record on March 31, 1938, June 30, 1938 and September 30, 1938, respectively	825.00
Carried Forward	\$2,418.75
Brought forward	\$2,418.75
Dividend of 15¢ per share on 2,000 shares Hecker Products Corporation (a New Jersey corporation) Common Stock, declared on March 23, 1938, payable on May 2, 1938, to stockholders of record on April 9, 1938	300.00
Dividend of 20¢ per share on 290 shares Philadelphia Company (a Pennsylvania corporation) Common Stock, declared on March 18, 1938, payable on April 25, 1938, to stockholders of record on April 1, 1938	58.00
Dividend of 87½¢ per share on 1,000 shares United States Smelting, Refining & Mining Company (a Maine corporation) 7% Preferred Stock, declared on March 23, 1938, payable on April 15, 1938, to stockholders of record on April 1, 1938	875.00

Dividend of \$1 per share on 18,000 shares American Can Company (a New Jersey corporation) Common Stock, declared on March 29, 1938, payable on May 16, 1938, to stockholders of record on April 25, 1938	18,000.00
Total	<u>\$21,651.75</u>

[fol. 9] (f) Said dividends were income of said decedent rather than income of the Estate of said decedent.

Wherefore the petitioner prays that this Board may hear the proceeding, redetermine the tax liability of the petitioner on account of the income tax of the Estate of said decedent for the calendar year 1938, determine that there is no deficiency in the income tax due from the petitioner on account of the income of the Estate of said decedent for the calendar year 1938, and that there is a refund of income tax due to the petitioner on account of the income of the Estate of said decedent for the calendar year 1938, in the amount of \$41.12, and grant such other and further relief as to the Board may seem proper.

Estate of Henry W. Putnam, Deceased, Guaranty Trust Company of New York, Executor, by A. W. LeGassick, Petitioner, Assistant Trust Officer; Carl A. de Gersdorff, William H. Gambrell, James H. Nichols, Counsel for Petitioner, 15 Broad Street, New York, New York.

[fol. 10] *Duly sworn to by A. W. Le Gassick. Jurat omitted in printing.*

[fol. 11] EXHIBIT "A" ANNEXED TO PETITION

Treasury Department

Internal Revenue Service

SN-IT-1

Mar. 6, 1940.

Office of Internal Revenue Agent in Charge 2d New York
Division. Estate of Henry W. Putnam, Deceased, Guar-
anty Trust Company of New York, Executor, 140 Broad-
way, New York, New York.

SIRS:

You are advised that the determination of your income tax liability for the taxable years ended Dec. 31, 1938 discloses a deficiency of \$2,658.64, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Revenue Agent in Charge, 90 Church Street, New York, New York, for the attention of LAL-90D. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest [fol. 12] period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner,
by (Signed) C. R. Krigbaum, Internal Revenue
Agent in Charge.

Enclosures: Statement. Form of Waiver.

LAL:mlm.

Statement

Estate of Henry W. Putnam, Deceased, Guaranty Trust Company of New York, Executor, 140 Broadway, New York, New York.

Tax Liability for Taxable Year Ended
December 31, 1938

	<i>Liability</i>	<i>Assessed</i>	<i>Deficiency</i>
Income tax	\$2,699.76	\$41.12	\$2,658.64

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated August 16, 1939; to your protest dated October 17, 1939; and to the statements made at the conferences held on November 6, 1939, and January 31, 1940.

[fol. 13] A copy of this letter and statement has been mailed to your representative, Mr. William H. Gambrell, 15 Broad Street, New York, New York in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Adjustment to Net Income

Net income as disclosed by return	\$2,027.78
Unallowable deduction and additional income	
(a) Dividends	22,209.17
Net income adjusted	<u>\$24,236.95</u>

Explanation of Adjustment

(a) Dividend income reported in amount of \$240,766.58 is increased \$22,209.17 by reason of the following:

1. The Bureau holds that Kennecott Copper Corporation dividends received in the year 1938 are taxable in their entirety. Accordingly, the amount of \$557.42 of a total of \$1,200.00 received from the aforesaid source, deemed by you to be nontaxable and omitted on your return, is included in gross income.

2. In order to protect the interests of the Government, dividends of \$21,651.75 declared prior to the date of death, payable to the stockholders of record on dates

after the date of death, have been included as income for the period after death.

[fol. 14]

Recapitulation

1.	\$557.42
2.	21,651.75
	<hr/>
Total	\$22,209.17

Computation of Tax
Revenue Act of 1938

Net income adjusted	\$24,236.95
Less: Personal exemption	1,000.00
	<hr/>
Balance (surtax net income)	\$23,236.95
Net income subject to normal tax	\$23,236.95
Normal tax at 4% on \$23,236.95	\$929.48
Surtax on \$23,236.95	1,770.28
	<hr/>
Total tax	\$2,699.76
Correct income tax liability	\$2,699.76
Income tax assessed:	
Original, Account No. 190456	41.12
	<hr/>
Deficiency of income tax	\$2,658.64
LAL:mlm.	

[fol. 15] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 102689

[Same title]

ANSWER—Filed July 6, 1940

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and in answer to the petition filed herein, admits, denies and avers as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies that the taxes in controversy are income taxes of the decedent for the calendar year 1938, and avers that while the notice of deficiency on its face appears to be a notice of deficiency for the calendar year 1938, a reading of the said notice reveals that it is a notice of deficiency for the period beginning March 31, 1938, and ending December 31, 1938. Denies the remaining allegations contained in paragraph 3 of the petition.

4. Denies that the Commissioner erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition. Denies the allegations of fact contained in said subparagraphs. (The deficiency notice from which this appeal is taken was sent to the petitioner in order to protect the interest of the Government in the event that the appeal in [fol. 16] Docket No. 102690 should be decided adversely to the respondent. This denial, together with the subsequent denials appearing in this answer, are entered for the purpose of protecting the interest of the Government in the event an adverse decision should be rendered in Docket No. 102690 in order to present to the Board the issue of whether certain items of income should be included in the income of the decedent for the period beginning January 1, 1938 and ending March 31, 1938, or should be included in income of the estate of the decedent for the period beginning March 31, 1938, and ending December 31, 1938.)

5(a) (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

5(c) Admits that the said dividend was included in the income tax return filed by the petitioner for the period beginning March 31, 1938 and ending December 31, 1938. Denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the petition.

5(d). Denies the allegations contained in subparagraph (d) of paragraph 5 of the petition.

5(e). Admits that in addition to the dividends described in subparagraph (d) of the petition, Commissioner has included in the income of the said decedent for the period beginning March 31, 1938 and ending December 31, 1938, the dividend on stock owned by the said decedent at the date of his death, which dividend was declared before the date of death but was payable as set forth in subparagraph (e) of

paragraph 5 of the petition. Denies the remaining allegations contained in subparagraph (e) of paragraph 5 of the petition.

[fol.17] 5(f). Denies the allegations contained in subparagraph (f) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinabove admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved and the appeal denied.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: E. O. Hanson, Division Counsel; Leonard A. Spalding, Jr., Special Attorney, Bureau of Internal Revenue.

[fol.18] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 102690

[Same title]

PETITION—Filed May 16, 1940

The above-named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LAL-90 D) dated March 6, 1940, and as a basis of its proceeding alleges as follows:

1. The petitioner is a fiduciary with its principal office at No. 140 Broadway, in the Borough of Manhattan, City and State of New York. Henry W. Putnam was an individual with his residence at the Savoy-Plaza Hotel, Fifth Avenue and 59th Street, in said Borough of Manhattan. Said Henry W. Putnam died on March 30, 1938. Guaranty Trust Company of New York is a corporation incorporated under the laws of the State of New York, having its principal office and place of business at No. 140 Broadway, in said Borough of Manhattan. Said Guaranty Trust Company of New York qualified as Executor of the Estate of said Henry W. Putnam, deceased, in the Surrogates' Court of the County of New York on June 16, 1938, and is still

qualified and acting as such Executor. The return for the period here involved was filed with the Collector of Internal Revenue for the Second District of New York, at the Custom House, New York, New York.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on March 6, 1940.

[fol. 19] 3. The taxes in controversy are the income taxes of said decedent for the calendar year 1938 (during which calendar year said decedent died on March 30, 1938). The deficiency asserted is \$1,509.13, the entire amount of which is in controversy. The petitioner asks a refund in the amount of \$13,576.95. The aggregate amount in controversy is accordingly \$15,086.08.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in adding to the gross income of said decedent reported in the income tax return which was filed for him for the calendar year 1938 the amount of \$2,400 which was not the income of said decedent.

(b) The Commissioner erred in refusing to exclude from the gross income of said decedent reported in the income tax return which was filed for him for the calendar year 1938 the amount of \$21,651.75 which was not the income of said decedent.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Said Henry W. Putnam died on March 30, 1938.

(b) Said decedent at the date of his death owned 4,800 shares of Common Stock of The American Smelting & Refining Company, a New Jersey corporation. A dividend of \$2,400 (50 cents per share) on said stock was declared on March 1, 1938, payable on May 31, 1938, to stockholders of record on May 6, 1938.

[fol. 20] (c) Said dividend was not included in the income tax return for 1938 which was filed for said decedent. The Commissioner included said dividend in the income of said decedent for 1938 as income accrued

at the date of his death under Section 42 of the Revenue Act of 1938.

(d) Said dividend was income of the estate of said decedent rather than income of said decedent.

(e) In addition to the dividend described in (b) above, there were included in the income tax return for 1938 which was filed for said decedent the following dividends on stocks owned by said decedent at the date of his death, which dividends were declared before the date of death, but the record dates of which were after the date of death:

Dividend of \$1.25 per share on 1,255 shares General Motors Corporation (a Delaware corporation) \$5 preferred Stock, declared on February 7, 1938, payable on May 2, 1938, to stockholders of record on April 4, 1938	\$ 1,568.75
Dividend of 50¢ per share on 50 shares United Profit Sharing Corporation (a Delaware corporation) Preferred Stock, declared on February 24, 1938, payable on April 30, 1938, to stockholders of record on March 31, 1938	25.00
Dividends of 25¢ per share on 1,100 shares Westinghouse Air Brake Manufacturing Company (a Pennsylvania corporation) Common Stock, declared on November 16, 1937, [fol. 21] payable on April 30, 1938, July 30, 1938, and October 31, 1938, to stockholders of record on March 31, 1938, June 30, 1938 and September 30, 1938, respectively	825.00
Dividend of 15¢ per share on 2,000 shares Hecker Products Corporation (a New Jersey corporation) Common Stock, declared on March 23, 1938, payable on May 2, 1938, to stockholders of record on April 9, 1938	300.00
Dividend of 20¢ per share on 290 shares Philadelphia Company (a Pennsylvania corporation) Common Stock, declared on March 18, 1938, payable on April 25, 1938, to stockholders of record on April 1, 1938	58.00
Carried forward	<u>\$ 2,776.75</u>

Brought forward \$ 2,776.75

Dividend of 87½¢ per share on 1,000 shares
United States Smelting, Refining & Mining
Company (a Maine corporation) 7% Pre-
ferred Stock, declared on March 23, 1938,
payable on April 15, 1938, to stockholders of
record on April 1, 1938 875.00

Dividend of \$1 per share on 18,000 shares
American Can Company (a New Jersey cor-
poration) Common Stock, declared on March
29, 1938, payable on May 16, 1938, to stock-
holders of record on April 25, 1938 18,000.00

Total \$21,651.75

[fol. 22] (f) The Commissioner refused to exclude said dividends from the income of said decedent for 1938 on the ground that said dividends were income accrued at the date of his death under Sec. 42 of the Revenue Act of 1938.

(g) Said dividends were income of the estate of said decedent rather than income of said decedent.

Wherefore the Petitioner Prays that this Board may hear the proceeding, redetermine the tax liability of the petitioner on account of the income tax of said decedent for the calendar year 1938, determine that there is no deficiency in the income tax due from the petitioner on account of the income of said decedent for the calendar year 1938, and that there is a refund of income tax due to the petitioner on account of the income of said decedent for the calendar year 1938 in the amount of \$13,576.95, and grant such other and further relief as to the Board may seem proper.

Estate of Henry W. Putnam, Deceased, Guaranty Trust Company of New York, Executor, by
(Signed) A. W. LeGassick, Assistant Trust Officer,
Petitioner; Carl A. de Gersdorff, William H. Gambrell, James H. Nichols, Counsel for Petitioner,
15 Broad Street, New York, New York.

[fol. 23] *Duly sworn to by A. W. LeGassick. Jurat omitted in printing.*

[fol. 24] EXHIBIT "A" ANNEXED TO PETITION

Treasury Department
Internal Revenue Service
New York, N. Y.

Mar. 6, 1940.

Office of Internal Revenue Agent in Charge, Room 1120,
Federal Office Building, Church and Vesey Streets, 2d
New York Division.

Estate of Henry W. Putnam, Deceased, Guaranty Trust
Company of New York, Executor, 140 Broadway, New
York, New York.

SIRS:

You are advised that the determination of the income tax liability of Henry W. Putnam, deceased, for the taxable year ended December 31, 1938, discloses a deficiency of \$1,509.13, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Revenue Agent in Charge, 90 Church Street, New York, N. Y., for [fol. 25] the attention of LAL-90D. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, By
(Signed) C. R. Krigbaum, Internal Revenue Agent
in Charge.

Enclosures: Statement. Form of waiver.
LAL:mlm.

Statement

Estate of Henry W. Putnam, Deceased, Guaranty Trust Company of New York, Executor, 140 Broadway, New York, New York.

Tax Liability for Taxable Year Ended December 31, 1938

	<i>Liability</i>	<i>Assessed</i>	<i>Deficiency</i>
Income Tax	\$49,455.81	\$47,946.68	\$1,509.13

In making this determination of the income tax liability of Henry W. Putnam, deceased, careful consideration has [fol. 26] been given to the report of examination dated August 16, 1939; to your protest dated October 17, 1939; and to the statements made at the conferences held on November 6, 1939, and January 31, 1940.

A copy of this letter and statement has been mailed to your representative Mr. William H. Gambrell, 15 Broad Street, New York, New York, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Adjustments to Net Income

Net income as disclosed by return	\$123,428.94
Unallowable deductions and additional income:	
(a) Dividends	\$2,400.00
(b) Taxes	34.09
Net income adjusted	\$125,863.03

Explanation of Adjustments

(a) Dividends declared prior to date of death, payable to stockholders of record on dates after the date of death, are held to constitute income to the decedent under the provisions of section 42 of the Revenue Act of 1938.

(b) Overaccrual in amount of \$34.09 of New York State income tax for the period January 1 to March 30, 1938, is disallowed, as follows:

Amount deducted on the return	\$15,832.63
Amount which accrued at date of death	15,798.54
Difference	\$ 34.09

[fol. 27] Computation of Tax Revenue Act of 1938

Net income adjusted	\$125,863.03
Plus: Long-term capital loss	243.56
Ordinary net income	\$126,106.59
Less: Personal exemption	1,000.00
Balance (surtax net income)	\$125,106.59
Less: Earned income credit	300.00
Net income subject to normal tax	\$124,806.59
Normal tax at 4% on \$124,806.59	\$ 4,992.26
Surtax on \$125,106.59	44,561.82
Partial tax	\$ 49,554.08
Minus: 30% of net long-term capital loss	73.07
Total tax	\$ 49,481.01
Less: Income tax paid at source	25.20
Corrected income tax liability	\$ 49,455.81
Income tax assessed:	
Original, Account No. 813226	47,946.68
Deficiency of income tax	\$ 1,509.13
LAL:mlm	

[fol. 28] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 102690

[Same title]

ANSWER—Filed July 6, 1940

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and in answer to the petition filed herein, admits, denies and avers as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies that the taxes in controversy are income taxes of the decedent for the calendar year 1938 and avers that while the notice of deficiency on which this appeal is taken appears upon its face to be a notice for the calendar year 1938, a reading of the entire notice reveals that it is a deficiency notice for the period beginning January 1, 1938, and ending March 30, 1938, which latter date the respondent admits to be the date of the death of the decedent, Henry W. Putnam. Denies the remaining allegations contained in paragraph 3 of the petition.

4. Denies that the respondent erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition. Denies all the allegations of fact contained in said subparagraphs.

[fol. 29] 5(a), (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

5(c). Admits that the said dividend was not included by the petitioner in the return filed for the period beginning January 1, 1938, and ending March 30, 1938. Admits that the Commissioner included said dividend in the income of the decedent for the period beginning January 1, 1938 and ending March 30, 1938, as income accrued at the date of his death under Section 42 of the Revenue Act of 1938. Denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the petition.

5(d). Denies the allegations contained in subparagraph (d) of paragraph 5 of the petition.

5(e). Admits that in its return for the period beginning January 1, 1938, and ending March 30, 1938, petitioner included the dividends enumerated in subparagraph (e) in determining the taxable income computed on said return. Further admits that the said dividends were declared before the death of the decedent but were payable to stockholders of record on the date set forth in subparagraph (e) of paragraph 5 of the petition. Denies the remaining allegations contained in subparagraph (e) of paragraph 5 of the petition.

5(f). Admits the allegations contained in subparagraph (f) of paragraph 5 of the petition.

5(g). Denies the allegations contained in subparagraph (g) of paragraph 5 of the petition.

[fol. 30] Denies generally and specifically each and every allegation contained in the petition not hereinabove admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved and the appeal denied.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: E. O. Hanson, Division Counsel; Leonard A. Spalding, Jr., Special Attorney, Bureau of Internal Revenue.

EBG.

7/1/40.

[fol. 31] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Same title]

Findings of Fact and Opinion

Docket Nos. 102689, 102690. Promulgated October 28, 1941

Where dividends are declared payable in future to stockholders of record on a future date and a stockholder dies after the declaration of dividend but before the future record date, *held*:

(1) The question of whether such dividends are corporate debts upon declaration and thus accruable to decedent must be determined by the law of the corporation's domicile.

(2) Such dividends declared by corporations domiciled in New Jersey are accruable to decedent, following *Estate of Lewis Cass Ledyard, Jr.*, 44 B. T. A. 1056.

(3) Such dividends declared by corporations domiciled in Delaware, Pennsylvania, and Maine are not corporate debts upon declaration, but only upon future record dates, it not appearing that the law of these

states is contrary to the general rule, to which the laws of New York and New Jersey are exceptions.

J. H. Nichols, Esq., for the petitioner.

L. A. Spalding, Esq., for the respondent.

In Docket No. 102690, the respondent determined a deficiency in income tax liability in the amount of \$1,509.13 against Henry W. Putnam, the decedent. This deficiency [fol. 32] is based upon the exclusion from taxable income of the decedent of dividends in the amount of \$2,400 declared prior to decedent's death, but not payable, however, until a month after his death and then to stockholders of record as of a week after his death. The respondent partially disallowed an accrual for taxes paid, the disallowance amounting to \$34.09.

In Docket No. 102689, the respondent determined a deficiency in income tax liability against the decedent's estate in the amount of \$2,658.64, based on the failure to report \$21,651.75 in dividends received by the estate, although declared prior to the decedent's death. A second factor in this docket was the asserted failure to report \$557.42 in dividends received by the estate, because deemed by the estate to be nontaxable.

In its petition in Docket No. 102689 the petitioner claims an overpayment by the estate of \$2,400 in dividends now sought to be taxed as income of the decedent, and claims that respondent erred in adding to the gross income of the estate the amount of \$21,651.75.

In its petition in Docket No. 102690 the petitioner claims that respondent erred in refusing to exclude from decedent's gross income as reported in the income tax return for 1938 the amount of \$21,651.75 which petitioner alleges was not the income of the decedent. Petitioner also claims respondent erred in adding to decedent's gross income the amount of \$2,400.

These two proceedings were consolidated for hearing and decision.

The sole question presented is whether dividends declared prior to the death of an individual stockholder, payable to stockholders of record on record dates subsequent to his death and payment dates subsequent to such record [fol. 33] dates, are properly includible in the income tax re-

turn of that individual, or whether they are properly includible in the income tax return of his estate.

FINDINGS OF FACT

The facts in these proceedings have been fully stipulated and are as follows:

1. The late Henry W. Putnam died on March 30, 1938. At the time of his death and at all times during 1938 until the time of his death he was a citizen of the United States of America and a resident of the Savoy-Plaza Hotel, Fifth Avenue and 59th Street, in the Borough of Manhattan, City, County and State of New York.

2. Guaranty Trust Company of New York is a corporation incorporated and existing under the laws of the State of New York, having its principal office and place of business at No. 140 Broadway, in said Borough of Manhattan.

3. Said Guaranty Trust Company of New York qualified as Executor of the Estate of said Henry W. Putnam in the Surrogates' Court of the County of New York on June 16, 1938, and is still qualified and acting as such Executor.

4. The Petitioner is the Estate of said Henry W. Putnam, deceased, Guaranty Trust Company of New York, Executor.

5. Said Henry W. Putnam at the date of his death owned 4,800 shares of Common Stock of The American Smelting & Refining Company, a New Jersey corporation. A dividend of \$2,400 (50¢ per share) on said shares owned by said [fol. 34] decedent was declared by said Company on March 1, 1938, payable on May 31, 1938, to stockholders of record on May 6, 1938. The petitioner received said dividend in the amount of \$2,400 on or about May 31, 1938.

6. The Petitioner also received dividends in the total amount of \$21,651.75 on shares of stock owned by said decedent at the date of his death on or about the payment dates as set forth below:

Dividend of \$1.25 per share on 1,255 shares General Motors Corporation (a Delaware corporation) \$5 Preferred Stock, declared on February 7, 1938, payable on May 2, 1938, to stockholders of record on April 4, 1938	\$1,568.75
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Dividend of 50¢ per share on 50 shares United Profit Sharing Corporation (a Delaware corporation) Preferred Stock, declared on February 24, 1938, payable on April 30, 1938, to stockholders of record on March 31, 1938	25.00
Dividends of 25¢ per share on 1,100 shares Westinghouse Air Brake Manufacturing Company (a Pennsylvania corporation) Common Stock, declared on November 16, 1937, payable on April 30, 1938, July 30, 1938, and October 31, 1938 to stockholders of record on March 31, 1938, June 30, 1938, and September 30, 1938, respectively	825.00
Dividend of 15¢ per share on 2,000 shares Hecker Products Corporation (a New Jersey corporation) Common Stock, declared on March 23, 1938, payable on May 2, 1938, to stockholders of record on April 9, 1938	300.00
[fol. 35] Dividend of 20¢ per share on 290 shares Philadelphia Company (a Pennsylvania corporation) Common Stock, declared on March 18, 1938, payable on April 25, 1938, to stockholders of record on April 1, 1938	58.00
Dividend of 87½¢ per share on 1,000 shares United States Smelting, Refining & Mining Company (a Maine corporation) 7% Preferred Stock, declared on March 23, 1938, payable on April 15, 1938, to stockholders of record on April 1, 1938	875.00
Dividends of \$1 per share on 18,000 shares American Can Company (a New Jersey corporation) Common Stock, declared on March 29, 1938, payable on May 16, 1938, to stockholders of record on April 25, 1938	18,000.00
Total	<hr/> \$21,651.75

7. The Petitioner duly filed with the Collector of Internal Revenue for the Second District of New York, at the Custom House, in said Borough of Manhattan, a 1938 United States income tax return on Form 1040 for said decedent for the period from January 1, 1938, to March 30, 1938, the date of death of said decedent, and a 1938 United States fiduciary income tax return on Form 1041 for the

Estate of said decedent for the period from March 30, 1938, the date of death of said decedent, to December 31, 1938.

8. The Petitioner included in said return for the Estate of said decedent for the period from March 30, 1938, to December 31, 1938, said dividend of \$2,400 described in paragraph 5 above.

[fol. 36] 9. The Petitioner included in said return for said decedent for the period from January 1, 1938, to March 30, 1938, the dividends in the total amount of \$21,651.75 described in paragraph 6 above.

OPINION

KERN :

The question which this proceeding poses is whether dividends declared prior to the death of decedent but which, by the terms of the declaration, are payable only to stockholders of record as of a date subsequent to decedent's death are accruable to decedent and taxable as his income, or are taxable as the income of his estate.

Upon this question the law of the domicile of the corporation declaring the dividend is controlling and it is to such law that we must look in determining whether and at what time a corporate debt arises pursuant to such declaration. *Helvering v. McGlue*, 119 Fed. (2d) 167; *Estate of Lewis Cass Ledyard, Jr.*, 44 B. T. A. 1056.

In those cases it was held that under the laws of New York and New Jersey, in which states the corporations involved were domiciled, a corporate debt arises upon the declaration of a dividend even though the dividend is payable to stockholders of record on some future date.

That rule, however, in effect in New York and New Jersey, does not represent the weight of authority. The rule in Connecticut and Massachusetts is to the effect that where dividends declared are, by the terms of the declaration, payable to stockholders of record at some future date, the corporate debt on account of such dividend does not arise until the future record date. *Union & New Haven Trust Co. v. Watrous*, 109 Conn. 268; 146 Atl. 727; *Richter & Co. v. Light*, 97 Conn. 364, 116 Atl. 600; *Nutter v. Andrews*, 246 Mass. [fol. 37] 224; 142 N. E. 67. *Dicta* in decisions in other states are in accord. See *Ford v. Ford Manufacturing Co.*, 222 Ill. App. 76; *In re Opperman's Estate*, 319 Pa. 455; 179 Atl. 729.

This latter rule seems to be that recognized by the Federal courts. *Sharp v. Commissioner*, 91 Fed. (2d) 802; *Buchanan v. National Savings & Trust Co.*, 23 Fed. (2d) 994. See *Alexander & Alexander, Inc. v. United States*, 22 Fed. Supp. 921, 923. However, compare *Lamberth v. Commissioner*, 120 Fed. (2d) 101, wherein the Circuit Court of Appeals for the Ninth Circuit erroneously and unnecessarily cites *Helvering v. McGlue*, *supra*, as authority for a general rule, whereas it is obvious that it merely stated the rule existing in New York. Compare also *First National Bank & Trust Co. v. Glenn*, 36 Fed. Supp. 552, wherein a contrary rule is stated on the sole authority of New York decisions. This latter rule of substantive corporation law was recognized by us as the general rule to be applied in *Estate of G. Percy McGlue*, 41 B. T. A. 1186. This case was reversed, but on the ground that the law of New York, the state in which the corporation was domiciled, was not in accord with the rule which we there took and which we now, after careful consideration, continue to take as representing the weight of authority.

In the absence of a convincing showing that the law of the corporation's domicile is to the contrary, we shall continue to apply the rule which we consider to represent the weight of authority, viz., that, where a corporation declares a dividend payable in the future to stockholders of record on some future date, a corporate debt on account of such dividend does not arise until such future date and, in the event a stockholder dies before such future record date, the dividend is not accruable to him and is not taxable as his income.

[fol. 38] In the instant proceeding the corporations declaring the dividends involved were domiciled in New Jersey, Delaware, Pennsylvania, and Maine. As to the dividends declared by the New Jersey corporations, we hold, pursuant to *Estate of Lewis Cass Ledyard, Jr.*, *supra*, that they were taxable as income of decedent. As to the dividends declared by the Delaware, Pennsylvania, and Maine corporations, we hold that they were not accruable to decedent and taxable as his income, but were taxable as the income of his estate.

Reviewed by the Board.

Decision will be entered under Rule 50.

Arundell, Smith, Turner, Mellott, and Oppen dissent.

[fol. 39] BEFORE UNITED STATES BOARD OF TAX APPEALS
Washington

Docket No. 102689

[Same title]

DECISION

Pursuant to the findings of fact and opinion of the Board promulgated October 28, 1941, the parties herein on November 24, 1941 having filed an agreed recomputation of tax, now, therefore, it is

Ordered and decided: That there is a deficiency in income tax for the calendar year 1938 in the amount of \$60.36.

(Signed) John W. Kern, Member. (Seal.)

Enter:

Entered Nov. 25, 1941.

[fol. 40] BEFORE UNITED STATES BOARD OF TAX APPEALS
Washington

Docket No. 102690

[Same title]

DECISION

Pursuant to the findings of fact and opinion of the Board promulgated October 28, 1941, the parties herein on November 26, 1941 having filed an agreed recomputation of tax, now, therefore, it is

Ordered and decided: That there is an overpayment of income tax for the calendar year 1938 in the amount of \$568.95, which amount was paid within three years before the filing of the petition (Sec. 322 (d), Revenue Act of 1938).

(Signed) John W. Kern, Member. (Seal.)

Enter:

Entered Nov. 27, 1941.

[fol. 41] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT

B. T. A. Nos. 102689 and 102690

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner on Review,

v.

ESTATE OF HENRY W. PUTNAM, DECEASED, Guaranty Trust
Company of New York, Executor, Respondent on Review

Petition for Review and Assignments of Error—Filed
February 18, 1942

To the Honorable Judges of the United States Circuit Court
of Appeals for the Second Circuit:

Now comes the Commissioner of Internal Revenue, by his attorneys (Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John M. Morawski, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

Jurisdiction

The petitioner on review is the duly appointed, qualified and acting Commissioner of Internal Revenue, hereinafter referred to as the Commissioner, holding his office by virtue of the laws of the United States.

[fol. 42] The respondent on review (hereinafter referred to as the taxpayer) in the Estate of Henry W. Putnam, deceased, Guaranty Trust Company of New York, Executor. Said Guaranty Trust Company of New York is a corporation incorporated under the laws of the State of New York, having its principal office and place of business at 140 Broadway, New York, New York. Said Guaranty Trust Company of New York is the duly qualified and acting executor of the Estate of Henry W. Putnam, deceased. The income tax return for the periods here involved were filed with the Collector of Internal Revenue for the Second District of New York, whose office is located within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II

Prior Proceedings

On March 6, 1940, the Commissioner determined a deficiency in income tax against the taxpayer in the amount of \$1,509.13 in respect of the income of the decedent for the period January 1, 1938, to March 30, 1938, the date of death of the decedent; and also on March 6, 1940, determined a deficiency in income tax against the taxpayer in the amount of \$2,658.64 in respect of the income of the decedent's estate for the period March 31, to December 31, 1938; and sent to the taxpayer by registered mail notices of said deficiencies in accordance with the provisions of existing internal revenue laws. Thereafter, and on May 16, 1940, the taxpayer filed petitions for redetermination of said deficiencies by the United States Board of Tax Appeals.

[fol. 43] The cases were tried before the Board of Tax Appeals on March 31, 1941, at New York, New York.

On October 28, 1941, the Board promulgated its findings of fact and opinion (45 B. T. A. — No. 84), and on November 25, 1941, entered its decision, relating to income of the decedent's estate, that there is a deficiency in income tax for the calendar year 1938 in the amount of \$60.36; and on November 27, 1941, entered its decision, relating to income of the decedent, that there is an overpayment of income tax for the calendar year 1938 in the amount of \$568.95, which amount was paid within three years before the filing of the petition (Section 322(d), Revenue Act of 1938).

III

Nature of Controversy

The question presented to the Board was whether dividends declared prior to the death of decedent but which, by the terms of the declaration, are payable only to stockholders of record as of a date subsequent to decedent's death are accruable to decedent and taxable as his income under the provisions of Section 42 of the Revenue Act of 1938, or are taxable as the income of his estate.

The facts were stipulated and are set out in the Board's findings of fact. The Commissioner contended that certain dividends amounting to \$24,051.75 are taxable to the decedent. Of these dividends \$20,700.00 were declared by New Jersey corporations and \$3,351.75 by Delaware, Pennsylvania and Maine corporations. The Board, in sustaining the Commissioner in part, held that the dividends declared by the New Jersey corporations were taxable as income of decedent, but, in reversing the Commissioner in part, held [fol. 44] that the dividends declared by the Delaware, Pennsylvania and Maine corporations, amounting to \$3,351.75, were not accruable to decedent and taxable as his income but were taxable as the income of his estate. Five members of the Board dissented without opinion.

IV

Assignments of Error

The Commissioner avers that in the record and proceeding before the Board of Tax Appeals and in the opinion and final decision rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceeding, opinion and final decision so rendered and entered by the Board of Tax Appeals:

The Board of Tax Appeals erred:

1. In holding in Docket No. 102690 (relating to income of the decedent for the period January 1, to March 30, 1938) that there is an overpayment of income tax for the calendar year 1938 in the amount of \$568.95 which amount was paid within three years before the filing of the petition (Sec. 222(d), Revenue Act of 1938).

2. In failing to hold in Docket No. 102690 that there is a deficiency in income tax for the calendar year 1938 in the amount of \$1,509.13. (In the event such deficiency is ultimately determined, then appropriate adjustment should be made in the tax liability in the case of Docket No. 102689 and decision entered therein accordingly.)

[fol. 45] 3. In holding that in the absence of a convincing showing that the law of the corporation's domicile is to the contrary, "we shall continue to apply the rule which we

consider to represent the weight of authority, viz., that where a corporation declares a dividend payable in the future to stockholders of record on some future date, a corporate debt on account of such dividend does not arise until such future date and, in the event a stockholder dies before such future record date, the dividend is not accruable to him and is not taxable as his income."

4. In failing to hold that the irrevocable declaration of a dividend by a corporation creates a debt due from the corporation to its stockholders regardless of the fact that the dividend is payable to stockholders of a later record date, and, in the event a stockholder dies before such future record date, the dividend is accruable to him and is taxable as his income.

5. In holding that the dividends declared by the Delaware, Pennsylvania and Maine corporations in the amount of \$3,351.75 are taxable as the income of the decedent's estate.

6. In failing to hold that the dividends declared by the Delaware, Pennsylvania and Maine corporations in the amount of \$3,351.75 are properly includible in the income tax return of the decedent for the taxable year based upon his income for the period beginning January 1, 1938, and ending March 30, 1938, under the provisions of Section 42 of the Revenue Act of 1938.

7. In that its decision is not supported by the evidence and is contrary to law.

[fol. 46] Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed by said Court.

(Sgd.) Samuel O. Clark, Jr., Assistant Attorney General;
(Signed) J. P. Wenchel, RLW, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: J. M. Morawski, Special Attorney, Bureau of Internal Revenue.

[fol. 47] *Duly sworn to by John M. Morawski. Jurat omitted in printing.*

[fol. 48] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

B. T. A. Nos. 102689 and 102690

[Same title]

NOTICE OF FILING PETITION FOR REVIEW—Filed February
23, 1942

To Guaranty Trust Company of New York, Executor, Estate of Henry W. Putnam, Deceased, 140 Broadway, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 18th day of February, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

[fol. 49] Dated this 18th day of February, 1942.

(Signed) J. P. Wenchel, RLW, Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 19th day of February, 1942.

Guaranty Trust Co. of New York, Executor of Estate of Henry W. Putnam, by (Sgd.) W. C. Bloom,
Trust Officer.

Respondent on Review.

[fol. 50] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

B. T. A. Nos. 102689 and 102690—

[Same title]

NOTICE OF FILING PETITION FOR REVIEW—Filed February
23, 1942

To James H. Nichols, Esquire, 15 Broad Street, New York,
New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 18th day of February, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

[fol. 51] Dated this 18th day of February, 1942.

(Signed) J. P. Wenchel, RLW, Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 19th day of February, 1942.

(Sgd.) James H. Nichols, Counsel for Respondent
on Review.

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT

Board of Tax Appeals Docket No. 102690

ESTATE OF HENRY W. PUTNAM, Deceased, Guaranty Trust
Company of New York, Executor, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

(1938 Income Tax of Decedent)

Board of Tax Appeals Docket No. 102689

ESTATE OF HENRY W. PUTNAM, Deceased, Guaranty Trust
Company of New York, Executor, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

(1938 Income Tax of Estate)

Petition for Review and Assignments of Error—Filed Feb-
ruary 25, 1942

To the Honorable, the Judges of the United States Circuit
Court of Appeals for the Second Circuit

[fol. 53] Now comes the Estate of Henry W. Putnam, deceased, Guaranty Trust Company of New York, Executor, a New York corporation, the Petitioner herein, and in support of this its petition filed in pursuance of the provisions of Sections 1141 and 1142 of the Internal Revenue Code for the review of the two decisions and orders herein-after described of the United States Board of Tax Appeals rendered on November 25, 1941, and November 27, 1941, respectively, respectfully shows to this Honorable Court as follows:

I

Statement of the Nature of the Controversy

1. On March 6, 1940, the Commissioner of Internal Revenue, the Respondent herein mailed to the Petitioner, by registered mail, a notice of the determination of a defi-

ciency in income tax in the amount of \$1,509.13 claimed by the Respondent to be due from the Petitioner for the calendar year 1938 under and by virtue of the Revenue Act of 1938 with respect to the income of the late Henry W. Putnam for the portion of the year 1938 during which he was alive, namely from January 1, 1938, to March 30, 1938, and a notice of the determination of a deficiency in income tax in the amount of \$2,658.64 claimed by the Respondent to be due from the Petitioner for the calendar year 1938 under and by virtue of the provisions of the Revenue Act of 1938 with respect to the income of the Estate of said Henry W. Putnam for the portion of the calendar year 1938 from March 30, 1938, to December 31, 1938. On May 16, 1940, the Petitioner duly filed with the United States Board of Tax Appeals (hereinafter called the Board) two petitions for the redetermination of said deficiencies.

[fol. 54] 2. Said deficiencies in income tax claimed by the Respondent to be due from the Petitioner resulted from the inclusion of certain dividends on shares of stock owned by the decedent at the date of his death, March 30, 1938, in certain New Jersey, Delaware, Pennsylvania and Maine corporations, in the total amount of \$24,051.75, which dividends were declared by such corporations before the date of death, but were payable to stockholders of a record date after the date of death, in the income accrued to the decedent for the period ending with his death and taxable as his income under Section 42 of the Revenue Act of 1938, and in the income of his Estate during the portion of the year 1938 after March 30, 1938. The deficiencies claimed in said two notices were inconsistent, in that said notices included said dividends in both the income of the decedent for the portion of the year 1938 during which he was alive and in the income of his Estate for the balance of said year.

3. All the facts involved in the cases were stipulated and the cases were tried before the Board on March 31, 1941, at New York, New York. At the hearing the two cases were consolidated for hearing and decision. On October 28, 1941, the Board promulgated its opinion in said appeals (45 B. T. A. No. 84) holding that the dividends of said New Jersey corporations in the total amount of \$20,700 were includible in the income of the decedent for the portion of the year 1938 during which he was alive, and that the dividends of said Delaware, Pennsylvania and Maine

corporations in the total amount of \$3,351.75 were includible in the income of the Estate of said decedent for the balance of said year.

[fol. 55] 4. On November 25, 1941, the Board rendered and entered in its records a decision and order in accordance with said opinion whereby it determined the amount of the deficiency in income tax due from the Petitioner on account of the income of the Estate of said decedent for the year 1938 to be \$60.36.

5. On November 27, 1941, the Board rendered and entered in its records a decision and order in accordance with said opinion whereby it determined an overpayment of income tax by the Petitioner with respect to the income of said decedent for the portion of the year 1938 during which he was alive in the amount of \$568.95, which amount was paid within three years before the filing of the petition.

II

Declaration of the Court in Which the Review is Sought

The Petitioner, feeling aggrieved by said decisions and orders, hereby petitions for the review thereof by the United States Circuit Court of Appeals for the Second Circuit, in which Circuit is located the office of the Collector of Internal Revenue to which was made the returns in respect of which the liability involved in this proceeding arises.

III

Assignments of Error

The Petitioner as a basis for the review of said decisions and orders, makes the following assignments of error:

[fol. 56] 1. The Board erred in holding that under the law of New Jersey a corporate debt arises upon the declaration of a dividend where the dividend is payable to stockholders of record on some future date.

2. The Board erred in including the dividends of said stocks of said New Jersey corporations in the total amount of \$20,700 in the income of the decedent pursuant to Section 42 of the Revenue Act of 1938, for the portion of the year 1938 during which he was alive, rather than in the

income of the Estate of the decedent for the balance of such year.

3. The Board erred in deciding that there was an overpayment of only \$568.95 of income tax for the calendar year 1938 with respect to the income of the decedent for the portion of such year during which he was alive.

4. The Board erred in refusing to decide that there was an overpayment of \$13,576.95 of income tax for the calendar year 1938 with respect to the income of the decedent for the portion of such year during which he was alive.

5. The Board erred in deciding that there was a deficiency of \$60.36 of income tax for the calendar year 1938 with respect to the income of the Estate of said decedent.

6. The Board erred in refusing to decide that there was an overpayment of \$41.12 of income tax for the calendar year 1938 with respect to the income of the Estate of said decedent.

[fol. 57] Wherefore your Petitioner prays that said decisions and orders of the Board be reviewed and modified or reversed by the United States Circuit Court of Appeals for the Second Circuit in accordance with law and for such other and further relief as said Court may deem meet and proper in the premises.

Estate of Henry W. Putnam, Deceased, Guaranty Trust Company of New York, Executor, Petitioner, by W. C. Bloom, Trust Officer; Carl A. de Gersdorff, William H. Gambrell, James H. Nichols, Attorneys for the Petitioner, 15 Broad Street, New York, New York.

Cravath, de Gersdorff, Swaine & Wood.

[fol. 58] *Duly sworn to by W. C. Bloom. Jurat omitted in printing.*

[fol. 59] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT

Board of Tax Appeals Docket No. 102690

Board of Tax Appeals Docket No. 102689

[Same Titles]

NOTICE OF FILING PETITION FOR REVIEW—Filed February 25,
1942

To: J. P. Wenchel, Esq., Chief Counsel, Bureau of Internal
Revenue, Attorney for the Respondent, Washington, D. C.

SIR:

Please take notice that on the 25th day of February, 1942, the Estate of Henry W. Putnam, deceased, Guaranty Trust Company of New York, Executor, the Petitioner in the above-entitled proceedings, filed with the Clerk of the United States Board of Tax Appeals the petition of said Petitioner, a copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Second Circuit of the two decisions and orders of said Board rendered and entered in its records in the above-entitled proceedings on November 25, 1941, and November 27, 1941.
[fol. 60] Dated, New York, N. Y., February 25, 1942.

Carl A. de Gersdorff, William H. Gambrell, James H. Nichols, Counsel for the Petitioner, Estate of Henry W. Putnam, Deceased, Guaranty Trust Company of New York, Executor, 15 Broad Street, New York, N. Y.

Cravath, de Gersdorff, Swaine & Wood.

ADMISSION OF SERVICE

Receipt of the foregoing notice of filing of petition for review and service of a copy of the petition therein mentioned are acknowledged this 25th day of February, 1942.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Attorney for the Respondent.

[fol. 61] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

B. T. A. Docket Nos. 102689—102690

[Titles omitted]

ORDER RE CONSOLIDATION—Filed March 13, 1942

Now on consideration of the joint motion filed herein by counsel for the respective parties to the above-entitled proceedings, it is

[fol. 62] Ordered, that the above-entitled proceedings be and they are hereby consolidated for briefing, hearing, argument and decision upon a single consolidated transcript of record, to be certified and transmitted to this Court by the Clerk of the United States Board of Tax Appeals, and that the costs of printing the consolidated record on review be borne one-half by each of the petitioners on review.

It is further ordered that the Clerk of this Court transmit to the Clerk of the United States Board of Tax Appeals a certified copy of this order to be by him incorporated in the record on review as certified and transmitted by him to this Court.

Enter:

(S.) Augustus N. Hand, Circuit Judge.

Dated: March 11, 1942.

A True copy:

(S.) D. E. Roberts, Clerk. (Seal.)

[fol. 63] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

B. T. A. Docket Nos. 102689 and 102690

B. T. A. Docket Nos. 102689 and 102690

[Same Titles]

PRAECIPE FOR RECORD—Filed March 9, 1942

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, with reference to the petition and

cross-petition for review heretofore filed in the above-entitled cause, a transcript of the record in said cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record duly certified copies of the following:

- (1) Docket entries of the proceedings before the Board.
- (2) Pleadings before the Board:
 - (a) Petitions.
 - (b) Answers.
- (3) Findings of fact, opinion and decisions of the Board.
- (4) Petition for review.
- (5) Notices of filing petitions for review.
- [fol. 64] (6) Court order of consolidation.
- (7) This praecipe.

(Signed) J. P. Wenchel, RLW; J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Attorney for Commissioner of Internal Revenue. (Sgd.) Carl A. de Gersdorff, William H. Gambrell, James H. Nichols, Attorneys for Taxpayer, 15 Broad Street, New York, New York.

[fols. 65-66] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 67] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1943

No. 5

Argued March 30, 1944. Decided August 4, 1944

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

GUARANTY TRUST COMPANY OF NEW YORK, Executor,
Respondent

GUARANTY TRUST COMPANY OF NEW YORK, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Before L. Hand, Swan and Chase, Circuit Judges

[fol. 68] PETITIONS TO REVIEW DECISIONS OF THE UNITED
STATES TAX COURT

These cross petitions bring up for review upon a consolidated record two orders of the Tax Court [45 B. T. A. 517] involving the income tax liability of Henry W. Putnam, who died on March 30, 1938, and of his estate. Reversed and remanded with directions.

Samuel O. Clark, Jr., Assistant Attorney General, Sewall Key, Robert N. Anderson and Irving I. Axelrad, Special Assistants to the Attorney General, for the Commission.

Carl A. De Gersdorff and Wm. Dwight Whitney, for the Taxpayer; James H. Nichols, William H. Gambrell and Cravath, Swaine & Wood, of counsel.

SWAN, Circuit Judge:

The question presented by these petitions is whether dividends declared before the death of an individual stockholder but payable by the terms of the declaration to stockholders of record on dates which fell after his death, were income taxable to the decedent or to his estate.

The facts are not in dispute. Henry W. Putnam, a resident of New York, died on March 30, 1938 owning shares

of stock in several corporations organized respectively under the laws of New Jersey, Delaware, Pennsylvania and Maine. Before his death each of the corporations declared a cash dividend payable in the future to stockholders of record on a future date. The relevant facts as to each [fol. 69] dividend are shown in the margin.¹ Although there is no express finding on the point, the parties have assumed, as do we, that the decedent kept his books upon the basis of cash receipts and disbursements. In due course the dividends in question were paid to the executor, and thereafter he filed an income tax return for the decedent for the period from January 1 to March 30, 1938, and an income tax return for the estate for the period from March 30 to December 31, 1938. In the former return he included all the dividends except one of \$2400, which he included in the estate's return. The commissioner surcharged the decedent's return by inclusion of the \$2400 dividend. Then to protect himself against an adverse decision, the commissioner likewise surcharged the estate's return by including all the dividends as income of the estate. The executor appealed to the Board of Tax Appeals (now the Tax Court) from both determinations. The Tax Court [fol. 70] held, five members dissenting without opinion, that the dividends of New Jersey corporations were accruable as income to the decedent and the dividends of Delaware, Maine and Pennsylvania corporations were not so accruable and were therefore income to the estate. The executor's petition attacks the former conclusion, the commissioner's petition the latter.

¹ Corporation	State of incorpora- tion	Amount of dividend	Declara- tion date	Record date	Payment date
1. American Smelting & Refining Co.	New Jersey	\$2,400.00	3/ 1/1938	5/ 6/1938	5/31/1938
2. General Motors Corp.	Delaware	1,568.75	2/ 7/1938	4/ 4/1938	5/ 2/1938
3. United Profit Sharing Corp.	Delaware	25.00	2/24/1938	3/31/1938	4/30/1938
4. Westinghouse Air Brake Mfg. Co.	Pennsylvania	825.00	11/16/1937	3/31/1938 6/30/1938	4/30/1938 7/30/1938
5. Hecker Products Corp.	New Jersey	300.00	3/23/1938	4/ 9/1938	5/ 2/1938
6. Philadelphia Co.	Pennsylvania	58.00	3/18/1938	4/ 1/1938	4/25/1938
7. United States Smelting, Refining & Mining Co.	Maine	875.00	3/23/1938	4/ 1/1938	4/15/1938
8. American Can Co.	New Jersey	18,000.00	3/29/1938	4/25/1938	5/16/1938

Section 42 of the Revenue Act of 1938, 52 Stat. 447, reads as follows:

"The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period."

The second sentence of the section originally appeared in the corresponding section of the Revenue Act of 1934; the congressional purpose in inserting it is explained in *Helvering v. Enright's Estate*, 312 U. S. 636, 639. It was eliminated in the Revenue Act of 1942.²

The decision of the Tax Court, 45 B. T. A. 517, went upon the ground that whether the dividends became corporate debts upon declaration and thus accruable to the decedent must be determined by the law of the corporation's [fol. 71] domicile. Before us both petitioners have argued that state law concepts of accrual are not controlling; they agree that the question is one of federal law calling for a uniform income tax rule throughout the country. We accept this theory, as we believe that "amounts accrued" within the meaning of section 42 presents a federal question which "is not determined by local characterization." See *Lyeth v. Hacy*, 305 U. S. 188, 193.

Against the commissioner's contention that the dividends "accrued" on the declaration date the executor interposes the argument that section 115 inhibits taxing a dividend until it is "made" to the shareholders, or in the words of the relevant regulation, Regs. 101, Art. 115-1, until "the cash or other property is unqualifiedly made subject to their demands". Reliance is placed on *Tar Products Corp. v. Commissioner*, 130 F. 2d 866 (C. C. A. 3) which holds that a dividend is taxable in the year of its receipt, not in the year of its declaration, even when the taxpayer's

² Section 134 of the Revenue Act of 1942, 56 Stat. 798.

books are kept on an accrual basis of accounting. But that case did not involve section 42, and we think it cannot be applied in the light of *Helvering v. Enright's Estate*, 312 U. S. 636. There Mr. Justice Reed said at pages 644-645:

"It is to be noted that no change was made by the 1934 Act in the §48 definition of 'accrued'. Yet, it is obvious that the definition is inapplicable since a taxpayer on a cash basis cannot have a 'method of accounting' by which the meaning of accrual is fixed. * * * It has been frequently said, and correctly, that §42 was aimed at putting the cash receipt taxpayer on the accrual basis. But that statement does not answer the meaning of accrual in this section. * * * Accruals here are to be construed in furtherance of the intent of [fol. 72] Congress to cover into income the assets of decedents, earned during their life and unreported as income, which on a cash return, would appear in the estate returns. Congress sought a fair reflection of income."

Hence the courts have recognized that accrued income under §42 "may be something different than a living taxpayer on an accrual basis may record as accrued income." *Bach v. Rothensies*, 124 F. 2d 306, 307 (C. C. A. 3), cert. den. 316 U. S. 666; *Helvering v. McGlue's Estate*, 119 F. 2d 167, 170 (C. C. A. 4); *Commissioner v. Cohen*, 121 F. 2d 348 (C. C. A. 5); *First Nat. Bank & Trust Co. v. Glenn*, 36 F. Supp. 552 (W. D. Ky.). These four cases all involved the accrual of dividends which the stockholder had not received at the date of his death. It is true that the *McGlue* case went upon the court's understanding of New York law, so that it is not a direct authority on the point before us; it does, however, support the view that "accrued" has a broader meaning in section 42 than the courts have given it in other connections. We are of opinion that within the meaning of the last sentence of section 42 the dividends accrue upon the declaration date rather than the record date. The declaration fixes the amount of the dividend and, being irrevocable by the corporation, it makes reasonably certain that the shareholder will receive payment, unless he dies or by his voluntary act disposes of the dividend before the record date. If he sells the stock the price he

will receive will reflect the value of the declared dividend. "From the economic and practical viewpoint", as Judge Miller said in *First Nat. Bank & Trust Co. v. Glenn*, 36 F. Supp. 552, 556, "the dividend has accrued." The orders are reversed and the cause remanded with directions to accrue the dividends to the decedent and determine the decedent's deficiency and the estate's overpayment accordingly.

[fol. 73] L. HAND, Circuit Judge (dissenting):

The Supreme Court held in *Helvering v. Enright's Estate*, 312 U. S. 636, that under §42 there might be "accruals" which were different from "accruals" in other connections; but the case only involved the value at the time of a partner's death of uncompleted services, performed by a firm of lawyers, some of which might be on a contingent basis, or indeed be only *quantum meruit*. The court held that, although these might not be "accrued" for ordinary purposes, they should be "accrued" in order to effect the purpose of §42, for otherwise the income would altogether escape taxation, which it was the purpose of the amendment to avoid. However, it is one thing to hold that one should compute the present value of all the items of unfinished work on a lawyer's books, even though there is a chance of error in doing so because some of the charges are contingent; they have a present value, which ordinarily can be approximately computed. But it is quite another thing, when the very obligee of a claim remains undetermined, arbitrarily to select one of the two or more possible persons who may become the obligee, and say that one will treat him as the owner of the claim. Such a doctrine, when applied between a decedent and his executors, may not indeed work unfairly; but, when applied to sales it leads, I submit, to preposterous results. Suppose the decedent sells the shares after the declaration of a dividend, but before the "record" date. The price of the shares will ordinarily include the dividend, for even the declaration of a dividend makes no difference in the case of companies which declare dividends regularly. Hence the decedent will pay a tax based upon his gain—if he has a gain—it may be a limited tax, but it is an income tax; and if he also pays a tax upon the dividend, he has paid twice. Moreover, even when he merely bequeaths the shares specifically,

to tax the decedent and not the legatee, presupposes that [fol. 74] in some way the company's earnings all along were the decedent's, for the declaration does not change his relation to them. It does set them apart for somebody, but not the decedent, unless he happens to outlive the "record" date. The confusion lies in the fact of treating the certainty that there is a debt as a certainty of the identity of the creditor. Anything is possible, but this goes beyond the declared object of the section, and, incidentally does not always favor the revenue. I agree that *Commissioner v. Cohen*, 121 Fed. (2) 348 (C. C. A. 5) is against this view; but it was based upon a mistaken reading of *Helvering v. McGlue*, 119 Fed. (2) 167 (C. C. A. 4), which went upon the court's understanding, possibly its misunderstanding, of New York Law.

[fol. 75] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of August one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

ESTATE OF HENRY W. PUTNAM, Deceased, et al.,
Respondents;

ESTATE OF HENRY W. PUTNAM, Deceased, et al.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the orders of said The Tax Court

of the United States be and hereby are reversed and the cause remanded with directions to accrue the dividends to the decedent and determine the decedent's deficiency and the estate's overpayment accordingly.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

Alexander M. Bell, Clerk, by A. Daniel Fusaro,
Deputy Clerk.

[fol. 76] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Commissioner of Internal Revenue, v. Estate of Henry W. Putnam, et al., Estate of Henry W. Putnam, et al., v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 25, 1944. Alexander M. Bell, Clerk.

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 48,987. U. S. Circuit Court of Appeals, Second Circuit. Term No. 534. Estate of Henry W. Putnam; Guaranty Trust Company of New York, Executor, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed October 2, 1944. Term No. 534, O. T. 1944.

(5273)